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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Midtown Hotel Group LLC,

10 Plaintiff,

11 v.

12 Selective Insurance Company of America, et  
13 al.,

14 Defendants.

No. CV-22-01395-PHX-JAT

**ORDER**

15 Pending before the Court are Defendant The Hartford Steam Boiler Inspection and  
16 Insurance Company's ("Hartford") Motion to Dismiss for Failure to State a Claim, (Doc.  
17 8), and Plaintiff Midtown Hotel Group, LLC's ("Midtown") Motion for Leave to Amend  
18 its complaint (Doc. 21). The Court now rules.

19 **I. BACKGROUND**

20 This action was filed in Arizona Superior Court in Maricopa County and removed  
21 to federal court based on diversity jurisdiction. It involves a dispute between an insurer,  
22 Defendant Selective Insurance Company of America ("Selective") and its policyholder,  
23 Midtown, over the type and extent of repairs and payments warranted under an insurance  
24 policy after an air-conditioning system malfunctioned and flooded the hotel covered by the  
25 policy. (*See* Doc. 1-3 at 2–7). In its complaint Midtown alleged breach of contract and bad  
26 faith breach of the implied covenant of good faith and fair dealing. (*Id.* at 7–9). Midtown  
27 named Selective as its insurer and Hartford as an "additional insurer" under its policy with  
28 Selective. (*Id.* at 4).

1 Hartford filed a motion to dismiss for failure to state a claim, stating that it was not  
 2 an additional insurer of Midtown but rather Selective's reinsurer,<sup>1</sup> and pointing out that it  
 3 was not a party to the policy. (Doc. 15-1 at 4–6). Hartford argued that, because it was not  
 4 a party to the contract between Selective and Midtown, Hartford had no contractual duty  
 5 toward Midtown which it could have failed to perform, tortiously or otherwise. (*Id.* at 8–  
 6 10). Midtown then filed its motion for leave to amend its complaint. (Doc. 21).

7 Midtown's proposed first amended complaint ("PFAC") adds a claim against  
 8 Hartford for aiding and abetting Selective's alleged bad faith breach, identifies Hartford as  
 9 a reinsurer rather than an additional insurer, and adds references to the reinsurance  
 10 agreement where the first complaint referred only to the insurance policy. (*Compare* Doc.  
 11 21-1 *with* Doc. 1-3). The PFAC alleges that at the time of the air conditioner malfunction  
 12 the property was insured by Selective, and that under a reinsurance agreement Hartford  
 13 was obliged to pay some or all of Midtown's damages. (Doc. 21-1 at 4). The PFAC further  
 14 alleges that Hartford acknowledged coverage of the claim, that Defendants appointed a  
 15 Hartford employee to be Midtown's primary point of contact regarding the claim, and that  
 16 Hartford controlled decisions regarding payment and settlement of the claim. (*Id.* at 5). The  
 17 PFAC then alleges that Defendants performed an inadequate investigation, have refused to  
 18 pay major portions of the claim (including lost business income owed to Midtown) without  
 19 adequately explaining their refusal, and that Defendants know or should know that such  
 20 refusal was unjustified given the damage to the property and recognized hotel industry  
 21 revenue projections (*Id.* at 5–7).

22 Count One of the PFAC alleges breach of contract, asserting that "Defendants have  
 23 failed to perform their obligations pursuant to the Policy and/or Reinsurance Agreement.  
 24 . . . thereby depriving Plaintiff of benefits it was to have received" under those contracts.  
 25 (*Id.* at 8–9). Count Two of the PFAC alleges that despite "one or both of the Defendants"  
 26 being obliged under "the Policy and the Reinsurance agreement" to pay Midtown,  
 27 Defendants have refused to adjust and negotiate the claim fairly and in good faith, and have

28 <sup>1</sup> (Doc. 15-1; Doc. 36 at 7). Reinsurance is essentially insurance for insurance companies.  
 Steven Plitt, et al., *Couch on Insurance* § 9:1 (3d ed. 2022).

1 acted in their own interests at Midtown’s expense in breach of their “contractual and/or  
 2 quasi-fiduciary” obligations. (*Id.* at 10–11). Count Three alleges that Hartford, through its  
 3 agents and employees, aided and abetted Selective’s bad faith by “attempting to . . .  
 4 ‘lowball’” Midtown’s claim by failing to conduct a prompt, adequate, or competent  
 5 investigation, by failing to provide a reasonable inspection of the property and a reasonable  
 6 assessment of damages and needed repairs, and by failing to promptly pay Midtown for its  
 7 claim. (*Id.* at 11–12).

## 8 **II. LEGAL STANDARD**

9 Leave to amend should be “freely give[n] . . . when justice so requires,” Fed. R. Civ.  
 10 P. 15(a). Such leave should be denied only if “the pleading could not possibly be cured by  
 11 the allegation of other facts,” or conversely should be granted whenever “it appears at all  
 12 possible that the plaintiff can correct the defect.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th  
 13 Cir. 2000) (first quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); then  
 14 quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1988)). But leave  
 15 to amend “need not be granted where the amendment of the complaint would cause the  
 16 opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or  
 17 creates undue delay.” *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.  
 18 1989).

## 19 **III. ANALYSIS**

20 Midtown argues that leave to amend should be granted because its PFAC properly  
 21 alleges breach of contract, bad faith, and aiding and abetting claims against Hartford. (Doc.  
 22 21 at 3–6). Hartford opposes the motion, arguing that leave to amend should be denied  
 23 because the PFAC fails to state a claim against Hartford upon which relief can be granted,  
 24 and amendment would therefore be futile. (Doc. 32 at 1–2). The Court will consider each  
 25 of Midtown’s claims against Hartford in turn, considering whether Midtown’s pleading of  
 26 each claim could possibly be cured (to the extent it is infirm) by the allegation of other  
 27 facts.  
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1           **a. Breach of Contract**

2           Midtown argues that its PFAC properly alleges a breach of contract claim because  
3 Midtown may be a third-party beneficiary of the reinsurance agreement, the reinsurance  
4 agreement might give Midtown direct rights against Hartford, or such rights may have been  
5 implied by Hartford's direct handling of the claim. (*See* Doc. 21 at 3 n.1).

6           At first glance the PFAC does not clearly allege that Midtown had a direct  
7 agreement with Hartford of the sort that would entitle it to a remedy sounding in contract.  
8 (*See* Doc. 21-1 at 8–9). But Midtown could, consistent with Arizona law, potentially allege  
9 facts allowing it to proceed against Hartford for breach of contract on at least two different  
10 theories. First, Midtown could possibly allege facts allowing it to maintain a breach of  
11 contract claim on a third-party-beneficiary theory. In Arizona, a person may recover as a  
12 third-party beneficiary of a contract where (1) “an intention to benefit that person” is  
13 “indicated in the contract itself,” (2) the “contemplated benefit” is “both intentional and  
14 direct,” and (3) it “definitely appear[s] that the parties intend to recognize the third party  
15 as the primary party in interest.” *Nahom v. Blue Cross & Blue Shield of Ariz., Inc.*, 885  
16 P.2d 1113, 1117 (Ariz. App. 1994). Put somewhat differently, the last element requires that  
17 “the third person must be the real promisee. The promise must be made to him in fact  
18 although not in form and it is not enough that the contract may operate to his benefit.”  
19 *Basurto v. Utah Constr. & Mining Co.*, 485 P.2d 859, 863 (Ariz. App. 1971) (citation  
20 omitted).<sup>2</sup>

21           Second, Midtown could allege facts showing that the reinsurance agreement itself  
22 expressly permits direct actions by certain of Selective's policyholders against Hartford.  
23 *Leal v. Allstate Ins. Co.*, 17 P.3d 95, 99 ¶ 21 (Ariz. App. 2000) (citing *Scroggins v. Allstate*  
24 *Ins. Co.*, 393 N.E.2d 718, 721 (Ill. App. Ct. 1979)).

25           Hartford argues that “Midtown is unable to prove the necessary elements of breach  
26 of contract against HSB with regard to the Reinsurance Agreement because Midtown is

27           <sup>2</sup> On this Court's quick review, although Midtown alleges in the PFAC that it was deprived  
28 of benefits it should have received under the reinsurance agreement, it is not readily  
apparent that Midtown has adequately alleged that it is the intended primary beneficiary of  
the reinsurance agreement. (*See* Doc. 21-1 at 8–9).

1 not a party to the Reinsurance Agreement.” (Doc. 32 at 3). As discussed, Midtown in some  
 2 circumstances could maintain an action for breach of contract without being a party to that  
 3 contract. And in any case, because Hartford has not disclosed the reinsurance agreement  
 4 and moved for summary judgment, this Court would be obliged to take as true on a motion  
 5 to dismiss any well-pleaded allegations Midtown chooses to make regarding the contents  
 6 of the reinsurance agreement. Thus, granting leave to amend would not necessarily be futile  
 7 as regards the breach of contract claim against Hartford.

#### 8 **b. Bad Faith**

9 Midtown argues that its PFAC properly alleges a bad faith claim against Hartford.  
 10 Hartford argues that Midtown’s claim for bad faith must fail because it has no contractual  
 11 relationship with Hartford. The Court finds that Midtown could possibly allege facts that  
 12 would allow it to maintain a bad faith claim directly against Hartford, and that amending  
 13 its complaint would therefore not necessarily be futile.

14 First, as discussed, Midtown could allege facts showing that it is a third-party  
 15 beneficiary of the reinsurance agreement. Arizona has recognized bad-faith liability in tort  
 16 arising from a third-party-beneficiary contractual relationship in multiple insurance  
 17 contexts. See *Rowland v. Great States Ins. Co.*, 20 P.3d 1158, 1167 ¶ 28 (Ariz. App. 2001)  
 18 (recognizing a third-party beneficiary bad-faith claim in a worker’s compensation context);  
 19 *Fobes v. Blue Cross & Blue Shield of Ariz. Inc.*, 861 P.2d 692, 695–698 (Ariz. App. 1993)  
 20 (recognizing the possibility of a third-party beneficiary bad-faith claim in a health  
 21 insurance context). Thus, granting leave to amend would not be futile because an  
 22 amendment properly alleging that Midtown is a third-party beneficiary would allow it to  
 23 maintain a bad-faith claim against Hartford.

24 Second, contractual privity is not always necessary to the maintenance of a bad-  
 25 faith claim where the alleged tortfeasor managed and controlled the insurance claim on  
 26 behalf of the insurer, particularly where requiring privity would “deprive a plaintiff from  
 27 redress against the party primarily responsible for damages.” *Gatecliff v. Great Republic*  
 28 *Life Ins. Co.*, 821 P.2d 725, 730–31 (Ariz. 1991) (quoting *Delos v. Farmers Ins. Co.*, 155

Cal. Rptr. 843, 849 (Cal. Ct. App. 1979); *and see Temple v. Hartford Ins. Co. Midwest*, 40 F. Supp. 3d 1156, 1166–67, 1169 (D. Ariz. 2014); *Lipsky v. Safety Nat’l Cas. Corp.*, No. 1-CA-CV 15-0337, 2017 WL 443525, at \*1–6 ¶¶ 1–2, 38 (Ariz. App. Feb. 2, 2017); *Bennett v. Ins. Co. of Pa.*, No. 1 CA-CV 10-0815, 2012 WL 424913, at \*1, 3 ¶¶ 1, 12 (Ariz. App. 2012); *Gorczyca v. Am. Fam. Mut. Ins. Co.*, No. CV 09-412-PHX, 2009 WL 10673446, at \*2–4 (D. Ariz. May 20, 2009). *But see Walter v. Simmons*, 818 P.2d 214, 222–23 (Ariz. 1991); *Goldberg v. Pac. Indem. Co.*, No. CV 05-2670-PHX, 2008 WL 508495, at \*1, 3 (D. Ariz. Feb. 21, 2008). Because, as discussed, the relationship between the parties remains unclear due to the secrecy of the reinsurance agreement, Midtown could possibly allege facts which would give rise to direct liability against Hartford on a bad faith breach of contract theory. Amendment would therefore not necessarily be futile with respect to Midtown’s bad faith claim against Hartford.

### **c. Aiding and Abetting**

Midtown argues that its PFAC properly alleges a claim against Hartford for aiding and abetting Selective’s alleged bad faith. Aiding and abetting in Arizona “require[s] proof of three elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor’s conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.” *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Loc. No. 395 Pension Tr. Fund.*, 38 P.3d 12, 23 ¶ 34 (Ariz. 2002) (citation omitted). Hartford argues that amendment would be futile because Midtown’s allegations are too conclusory to adequately plead how Hartford allegedly has knowledge that Selective’s actions constituted bad faith. (*See Doc. 32 at 7*).

The Court is not persuaded by Hartford’s argument. For Hartford not to know that the alleged actions forming the basis of the bad faith claim were tortious, Hartford must either (1) not have known that the actions were taken, or (2) have known the actions were taken but not have known they constituted a breach of Selective’s duty. In almost every instance the PFAC alleges that the actions forming the basis of the bad faith claim were

undertaken either by both defendants, by Hartford, or by Hartford's agents. (*See* Doc. 21-1 at 4–12). In other words, Midtown alleges that each action taken by Selective in breaching its duty was also taken by Hartford. This Court has no difficulty concluding that Hartford plausibly had knowledge of actions that Hartford itself took jointly and simultaneously with Selective.<sup>3</sup> Further, as Midtown alleges in the PFAC that Hartford is “engaged in the business of insurance in . . . Arizona,” the Court would have no difficulty inferring from the PFAC, even had Midtown not also alleged it, that Hartford “understood the duties owed by an insurance carrier such as itself and Selective,” and therefore also understood that the actions it allegedly took jointly with Selective were tortious. (*Id.* at 2, 11–12).

It is true that the Court has several times found Arizona law to require that, where the acts constituting an insurer's bad faith are performed by a claims adjuster, to properly state a claim for aiding and abetting a plaintiff must allege a separate act by the adjuster which aids and abets an act by the insurer. *Jones v. Colo. Cas. Ins. Co.*, No. CV 12-1968-PHX, 2013 WL 4759260, at \*2–5 (D. Ariz. Sept. 4, 2013) (Finding that the alleged aider-and-abettor “could not have known about conduct that did not exist.”); *Young v. Liberty Mut. Grp.*, No. CV-12-2302-PHX, 2013 WL 840618, at \*2–4 (D. Ariz. Mar. 6, 2013); *Ortiz v. Zurich Ams. Ins. Co.*, No. CV-13-02097-PHX, 2014 WL 1410433, at \*3–6 (D. Ariz. Apr. 11, 2014). On this Court's quick review, due to the ubiquitous use of the collective term “Defendants” in the PFAC it is not immediately clear whether the PFAC adequately alleges that Hartford took a distinct action that aided and abetted a separate action taken by Selective.

However, both the Arizona Court of Appeals and courts in this district have come to differing conclusions in considering whether an adjuster can aid and abet an insurer where the actions of the adjuster substantially overlap with those alleged as the basis of the bad faith claim against the insurer.<sup>4</sup> To the extent these cases are reconcilable, their

<sup>3</sup> *Cf.* Restatement (Second) of Torts § 876 cmt. d, illus. 6 (Am. L. Inst. 1965) (“A and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, which is negligent toward persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is subject to liability to C.”).

<sup>4</sup> *Chukly v. Am. Fam. Mut. Ins. Co.*, No. CV-17-0088-TUC, 2017 WL 5952759, at \*3–4 (D. Ariz. June 17, 2017) (citing *Bennett*, 2012 WL 424913, at \*8; *Lipsky*, 2017 WL

1 differing dispositions indicate that their outcomes may have tightly turned on fine factual  
 2 distinctions. Thus, even very small changes in the facts plaintiff alleges have the potential  
 3 to cure any infirmities in the PFAC. For example, it appears possible that Midtown could  
 4 amend its complaint to clarify that certain tortious actions were taken separately by one  
 5 defendant or the other, or to specify which portions of an action alleged to have been done  
 6 jointly and simultaneously were performed by which defendants. The Court therefore does  
 7 not find that granting leave to amend the complaint would necessarily be futile with respect  
 8 to Midtown's aiding and abetting claim against Hartford.

9 Because amendment would not be futile and would serve "the underlying purpose  
 10 of Rule 15 to facilitate decision on the merits, rather than on the pleadings or  
 11 technicalities," *Lopez*, 203 F.3d at 1127, the Court will grant leave to amend. In amending  
 12 its complaint Midtown is not limited to filing the PFAC but may make other amendments  
 13 as it wishes with the benefit of the above-cited cases. Assuming that Midtown will take  
 14 advantage of this opportunity and amend its complaint, the Court will also deny Hartford's  
 15 motion to dismiss as moot.

#### 16 **IV. CONCLUSION**

17 For the foregoing reasons,

18 **IT IS ORDERED** granting Midtown's motion for leave to amend its complaint  
 19 (Doc. 21). Midtown may file an amended complaint within 30 days. Midtown is not limited  
 20 in filing its amended complaint to the amendments indicated in the proposed amended  
 21 complaint (at Doc. 21-1). If Midtown does make further amendments, it must also file a  
 22 document indicating any differences between the complaint and the amended complaint.

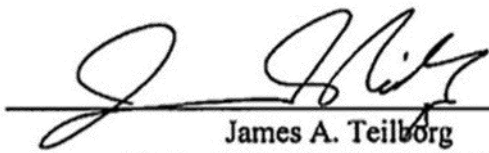
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24 443525, at \*7; *Young*, 2013 WL 840618, at \*3; *Jones*, 2013 WL 4759260, at \*3; *Ortiz*,  
 25 2014 WL 1410433, at \*3–5; *Lemaster v. Hartford Ins. Co. Midwest*, No. CV-13-02017-  
 26 PHX, 2016 WL 705125, at \*10 (D. Ariz. Feb. 23, 2016); *Lambert v. Liberty Mut. Fire Ins.*  
 27 *Co.*, No. 14-cv-00521, 2014 WL 5432154, at \*3 (D. Ariz. 2014); *Rosso v. Liberty Ins. Co.*,  
 28 CV-16-00860-PHX, 2016 WL 4013614, at \*2–3 (D. Ariz. July 27, 2016); *Inman v. Wesco*  
*Ins. Co.*, No. CV-12-02518-PHX, 2013 WL 2635603, at \*2–3 (D. Ariz. June 12, 2013);  
*Wilson v. Accident Fund Gen. Ins. Co.*, No. 13-cv-2012, 2013 WL 6670330, at \*2–3 (D.  
 Ariz. Dec. 18, 2013); *Haney v. Ace Am. Ins. Co.*, No. CV-13-02429-PHX, 2014 WL  
 1230503, at \*4–5 (D. Ariz. Mar. 25, 2014); *Temple*, 40 F. Supp. 3d at 1170).

1           **IT IS FURTHER ORDERED** that if Midtown timely files the amended complaint  
2 permitted herein, each defendant shall answer or otherwise respond to the amended  
3 complaint within 14 days of when it is filed.

4           **IT IS FURTHER ORDERED** that Hartford's motion to dismiss Midtown's  
5 complaint (Doc. 8) is denied as moot. In the event that Midtown does not timely file an  
6 amended complaint Hartford's motion to dismiss will again be deemed pending.

7           Dated this 19th day of December, 2022.

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11           James A. Teilborg  
12           Senior United States District Judge  
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